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IN THE

Supreme Court of the United States

October Term 1994

MILLER, *et al.*,
Appellants

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

ABRAMS, *et al.*,
Appellants,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

UNITED STATES,
Appellant,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of all forty African Americans who have been elected to the House of Representatives and, in addition, Carol Mosely Braun of Illinois, a member of the United States Senate. The issue as to how congressional boundaries are drawn in Georgia and throughout the nation could affect directly twenty or more members of the present Caucus and millions of African Americans and other minorities who reside in the minority-majority districts where the issue has been or may be raised. The Caucus filed an *amicus* brief in the proceedings below, and all counsel have consented to the filing of this *amicus* brief.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that the minority-majority districts in issue in this and related cases are indispensable in the fight for full integration of the American political landscape. Minority-majority districting is only a specific illustration of the more general goal of *all* districting, particularly single-member districting: it is intended to allow the direct representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of American history and contemporary reality, minority-majority districts are often the only way of fully achieving the pluralist aspirations of American politics and remedying the longstanding exclusion of African Americans from full participation in government. Moreover, the use of minority-majority districts, like Georgia's District Eleven and the other minority-majority districts represented by members of the Caucus, shows that these districts have not resulted in the harms this Court feared from race-conscious districting; the challenged districts do not segregate voters on the basis of race, and representatives from minority-majority districts fairly represent the interests of *all* their constituents—regardless of race.

This Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), nevertheless has unleashed a torrent of litigation challenging minority-majority congressional districts drawn after the 1990 census. In three cases, lower federal courts have used *Shaw* as a roving warrant to flout Congress's commitment to full integration of the political system. In so doing, these lower courts have disregarded this Court's reluctance to interfere in the intensely political process of districting, which inevitably involves "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Shaw reflects this Court's hopes and its fears about the American political system. *Shaw* confirms this Nation's deep commitment to integration of the political system. The Fourteenth and Fifteenth Amendments to the Constitution expressly pledge to eradicate the political exclusion of racial minorities, particularly African Americans. *See Shaw*, 113 S. Ct. at 2822-31. This constitutional command underlies the Voting Rights Act of 1965, which gives all Americans an "equal opportunity to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988). Moreover, as *Shaw* recognizes, the political system should ensure that elected officials are responsive to the needs of all of their constituents; no official should ignore the distinctive needs of the citizens he or she represents because of their race. *See Shaw*, 113 S. Ct. at 2827. Finally, *Shaw* expresses an aspiration for American politics to become less race-conscious and polarized. *See id.* at 2827, 2832.

At the same time, *Shaw* sets forth several reservations about the deliberate creation of irregularly-shaped, minority-majority districts. *Shaw* foresees two potential dangers in such districts. *First*, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group rather than their constituency as a whole." *Id.* at 2827. *Second*, to the extent that such districts reinforce stereotypes about racial distinctions, they may

"exacerbate...patterns of racial bloc voting," *id.*, and further polarize American politics.

It is the position of the Caucus that the opinion and order of the *Johnson* trial court is inconsistent with this Court's opinion in *Shaw*. The lower court failed to recognize that the challenged minority-majority district meets the aspirations for the American political system identified in *Shaw*. Further, the court below failed to assess the fears noted in *Shaw*. Such inquiry would have revealed that Georgia's District Eleven does not present either danger but rather moves toward the realization of this Court's, indeed the Constitution's, aspirations for American democracy. The lower court decision should be reversed. If, however, the Court concludes that the decision below is consistent with or required by *Shaw*, we submit that the *Shaw* decision was "wrongly decided," and should be revised.[1/]

II.

MINORITY-MAJORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING AN INTEGRATED POLITICAL SYSTEM

For far too long, this nation was unresponsive and often hostile to the needs of its African-American citizens. Prior to Reconstruction, and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. By 1901 (the end of the First Reconstruction), the massive disfranchisement of African-American voters through fraud, intimidation, and a variety of invidiously discriminatory

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[1/] In *Fullilove* v. *Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy* v. *Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided."). For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick & M. David, *Shaw* v. *Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

devices (such as poll taxes and literacy tests) had entirely purged Congress of African-American members. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944 there was but one. And the voice of Congress's sole African-American representative from 1935 to 1943, Arthur Mitchell of Illinois, was all but silenced by the antagonistic posturing of his white colleagues—some of whom were members of his own party.[2/]

The consequences of the exclusion of African Americans from voting and thus from Congress were painfully visible, even after World War II, as Congress consistently worked to advance the interests of the white majority at the expense of minority groups. Thus, for example, in 1957 southern congressmen almost uniformly joined the "Southern Manifesto," rejecting the doctrine of *Brown* v. *Board of Education* and adhering solely to the interests of those white constituents who wanted to maintain segregation in America—to the detriment of a significant African-American southern population.[3/]

Georgia's District Eleven and other challenged minority-majority districts have served to move America beyond this deplorable history and toward the ideal of a representative demo-

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[2/] During the Democratic Party convention of 1936: "Congressman Mitchell's presence on the podium...was used as an excuse for a U.S. senator from South Carolina and eight other delegates to stage a walkout in protest. But even that demonstration was mild compared to what had happened in previous conventions...." William L. Clay, *Just Permanent Interests: Black Americans in Congress: 1870–1991* 72 (1992). *See* Note 9, *infra*, discussing other indignities Mitchell experienced.

For a list of African Americans who have served in Congress, *see* Appendix A hereto.

[3/] Nineteen senators and 83 representatives from the South, with approximately 9 million African-American constituents, joined the Manifesto. *See* Norman Dorsen *et al.*, 2 *Political and Civil Rights in the United States* 625 n.2 (4th ed. 1979) (for history of manifesto); George T. Kurian, *Datapedia of the United States: 1790–2000* 18–26 (1994) (for southern population).

cracy, one that encourages the inclusion of *all* Americans in political discourse. Progress has been slow in coming. Indeed, only after the 1992 congressional elections did the number of African-American members of Congress rise from 26 to 40. Absent the minority-majority districts that facilitated this change, however, America cannot realistically hope soon to achieve a racially integrated legislature that adequately allows for the expression of the experiences and views of *all* Americans. Decisions such as the district court's opinion in this case ignore the crucial importance of achieving a racially integrated legislature in a multiracial nation.

A. The Central Purpose of Single Member Congressional Districts Is to Achieve Representation of Minority Groups

Nothing in the Constitution requires congressional representatives to be elected from single-member districts. Nevertheless, single-member districting, which has been required by federal statute since 1842, serves a critical function: the direct representation in Congress of communities with distinct political interests that otherwise would be unrepresented were elections conducted on an at-large basis. Single-member districts promote a diversity of experience, insight and outlook in Congress that both results in better and more representative lawmaking and promotes citizen confidence in the legitimacy of the legislative process.

Single-member congressional districts were first mandated by the Reapportionment Act of 1842. This Act advanced James Madison's notion that single-member districts would best allow for the representation of local communities. As Madison explained in Federalist Paper 56:

> Divide the largest state into ten or twelve districts and it will be found that there will be no peculiar local interest...which will not be within the knowledge of the Representative of that district.

Indeed, the committee forwarding the 1842 Act explicitly intended the single-member districts to enable minorities to have representation in the face of differing majorities. That committee explained:

> [At-large elections] stifl[e] the voice and smother[] the opinions of minorities...thus disfranchised by the overbearing insolence of a majority, always meager, and as it grows leaner growing more inexorable and oppressive.

H.R. Rep. 909, 27th Cong., 2d Sess. at 8 (1842).

Thus the overriding purpose of single-district voting is to enhance pluralism in Congress by promoting the grouping and political participation of various communities in American democratic life. Georgia's District Eleven and other challenged minority-majority districts advance this purpose, by including the views and protecting the interests of a distinct minority group, African Americans. Only a pluralistic Congress—one that includes the presence of legislators of various backgrounds—can fairly ensure that all appropriate interests are considered, as the government forges policies that dramatically affect the lives of all American citizens, including those who are members of minority groups.

B. Groups Defined by Reference to Religious, Racial, Ethnic, and Socioeconomic Status Form the Building Blocks of Our Pluralist Democracy

As Justice O'Connor recognized in her concurring opinion in *Davis v. Bandemer*, 478 U.S. 109, 147 (1986), the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." In the context of America's unique history, it is essential that this Court recognize that African Americans often form a community with distinct political interests.

One key source of African Americans' commonality of interests is, of course, this Nation's lamentable history of overt racial discrimination.[4] African Americans were enslaved,[5] and later denied the rights to purchase property or live in certain areas,[6] learn,[7] work,[8] travel with dignity,[9]

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[4] *See generally* John Hope Franklin, *From Slavery to Freedom* (7th ed. 1994); Gunnar Myrdal, *An American Dilemma* (1944).

[5] *See Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857) ("[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted ... [African Americans] had no rights which the white man was bound to respect."); *see also* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 6 (1978).

[6] *See Buchanan* v. *Warley*, 245 U.S. 60, 79 (1917) (municipal racial segregation law); *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948) (racially restrictive covenant); *see also* John Hope Franklin, *supra* note 4, at 311; A. Leon Higginbotham, Jr., F.M. Higginbotham and S.S. Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 Univ. Ill. L. Rev. 763 (1990).

[7] *See Cumming* v. *Board of Educ.*, 175 U.S. 528, 545 (1899) (Board of Education suspended "for economic reasons the high school for colored children"); *Gaines* v. *Canada*, 305 U.S. 337, 352 (1938) (black citizens of Missouri denied the right to attend the only state supported law school); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (racial segregation in public schools); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools).

[8] *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (blacks denied membership in labor union on account of race); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (racially discriminatory bargaining agreement); *see also* John Hope Franklin, *supra* note 4, at 235.

[9] Even the one African-American in Congress in the 1930s was denied the right to travel with dignity. As Congressman Arthur Mitchell testified, after he identified himself as a U.S. Congressman to a train conductor in

(continued...)

marry,[10] and vote,[11] simply because of the "color of their skin." *Shaw*, 113 S. Ct. at 2827.

Nor is this legacy ancient history. The continuing effects of this state-sponsored history of slavery, *de jure* segregation, brutality, and exclusion from voting persist. Many middle-aged African Americans attended inferior, racially segregated schools and their substandard educations continue to hamper their ability to compete in the workforce, to afford adequate housing, and to participate effectively in the political process.[12] Even today, white attitudes hardened by state-sponsored *de jure* segregation often result in racially polarized voting and contribute to discrimination in employment, housing, public accommodations, and a variety of other circumstances.

Federal legislation has been an essential weapon in the fight to remedy the effects of this past and continuing racial discri-

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[9](...continued)
Arkansas, the conductor said "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in [the first class] car." Record of the United States Supreme Court, *Mitchell* v. *ICC*, 313 U.S. 80 (1941) (No. 577), at 79, and *Mitchell* v. *ICC*, 313 U.S. 80, (1941) (denial of "separate but equal" first-class railroad accommodation to African Americans); *see also Plessy* v. *Ferguson*, 163 U.S. 537, 540 (1896) (Louisiana's racial segregation of railroad passengers); *The Civil Rights Cases*, 109 U.S. 3 (1883) (denial of "separate but equal" first-class railroad accommodation to African Americans).

[10] *See Loving* v. *Virginia*, 388 U.S. 1 (1967) (Virginia's anti-miscegenation statute).

[11] *See Hobbs* v. *Fogg*, 6 Watts 553 (Pa. 1837) (African Americans in Pennsylvania denied the right to vote on account of race); *Giles* v. *Harris*, 189 U.S. 475 (1903) (Alabama Constitution denied African Americans the right to vote on account of race); *see also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (setting out history of racial discrimination in voting).

[12] *See* John Hope Franklin, *supra* note 4, at 405-32.

mination, and Congress's use of its Fourteenth and Fifteenth Amendments and Commerce Clause powers to fight for racial justice has been a significant element of the legislative agenda of the past three decades.[13/] Americans of all races have supported these remedial measures. Nevertheless, African-American constituents, witnesses, and representatives have been in the forefront of these legislative efforts.

Even beyond their generally cohesive support for certain explicitly race-conscious legislative measures, African Americans often form a discrete community. Recognition of this thread of shared interests does not involve the type of pernicious stereotyping referred to by this Court in *Shaw* or the court below. *See* 113 S. Ct. at 2827; App. at 46. African Americans, enslaved and segregated because of their race, were excluded from the dominant American culture and forced to develop distinct cultural traditions, woven together from the strands of the disparate African traditions of their homelands. The result is indubitably, uniquely, and recognizably African American. It includes the literature of Richard Wright, Ralph Ellison and Toni Morrison, the poetry of Phyllis Wheatley and Langston Hughes and art forms such as blues, gospel

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[13/] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.* (1988)); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 *et seq.* (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e (1988)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 *et seq.* (1988)); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C. § 5001 *et seq.* (1988) (repealed in part 1993)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (to be codified at 42 U.S.C. § 3601 *et seq.*); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.).

and jazz.[14/] African-American culture is also uniquely expressed in painting, sculpture, film and dance. Similar to other ethnic, religious, and occupationally-defined groups, African Americans, who share a common cultural heritage, often share a common perspective on many issues the government faces—ranging from political solidarity with the people of certain foreign countries to support for particular foreign and domestic, economic and cultural policies.

There are numerous examples of how commonality of culture influences American politics. Over the years, Irish-American members of Congress and representatives from constituencies with significant Irish-American populations have developed particular interest and expertise in issues connected with Northern Ireland.[15/] Similarly, Jewish-American legislators and representatives with large numbers of Jewish-American constituents have been especially active in issues involving the Middle East.[16/]

Like these other minority groups, in recent years, members of the Caucus have labored to advance interests of particular concern to African Americans. Caucus members thus have taken a

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[14/] *See generally* 27 *Eighteenth-Century Studies* No. 4, *Special Issue: African-American Culture in the Eighteenth Century* (1994); Talmadge Anderson, *Introduction to African American Studies* 251-82 (1993); Roger D. Abrahams, *Singing the Master: The Emergence of African American Culture in the Plantation South* (1992).

[15/] For example, Sen. Edward Kennedy, of Massachusetts, has often spoken out regarding affairs in Northern Ireland. *See, e.g., Dublin Journal: A Kennedy Pleases the Irish, Piques Some Envoys*, N.Y. Times, July 29, 1994, A4; *Political Leader of I.R.A. Begins a Tour of the U.S. in Boston*, N.Y. Times, Sept. 25, 1994, at 13; *Bay State Delegation Arrives in Ireland to Meet Leaders*, The Boston Herald, Dec. 11, 1994, at 2.

[16/] For example, Rep. Charles Schumer, of New York, has regularly promoted favorable relations with Israel. *See, e.g., Baxter International Settles Boycott Case—Firm Fined $6 Million for Aiding Arab League*, Wash. Post, Mar. 26, 1993, at D1.

leading role in debating American policy with regard to South Africa and Haiti. For example, the Caucus successfully pressed for a more equitable application of American foreign policy to the Haitian refugee crisis, by bringing to the fore the disparity between the Clinton Administration's policy with respect to the treatment of Cuban and Haitian immigrants. The Caucus's role in such affairs is appropriate and critical.[17/]

Similarly, on the domestic front, the Congressional Black Caucus worked to raise concerns about the fairness of the recent crime bill. Ultimately, most African-American representatives voted in favor of the bill, even though a Caucus-sponsored amendment concerning racism in death penalty sentencing was defeated.[18/]

But the importance of having a racially integrated Congress in a multi-racial society goes far beyond African-American representatives' decisive role in a few identifiable debates of particular importance to the African-American community. As this

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[17/] *Cf. Haitian Refugee Center, Inc.* v. *Baker*, 112 S. Ct. 1245, 1246 (1992) (Thomas, J., concurring in denial of *certiorari*) (the matter of Haitian refugees "must be addressed by the political branches").

A similar dynamic is evident with regard to female representatives. Last year's debate over whether the naval commander in charge during the infamous "Tailhook Scandal" should be retired at full rank provides an example of the significance of even a small coalition of women: it transformed what otherwise would have been a *pro forma* exchange into a national debate on gender relations. *See* Maureen Dowd, *Senate Approves a 4-Star Rank for Admiral in Tailhook Affair: 54-43 Vote Followed Heated Debate on Floor*, N.Y. Times, Apr. 20, 1994, at A1, B10. The further representation of women's interests—by women—in the Senate would no doubt have further altered the tenor and perhaps the outcome of that debate.

[18/] *See The Crime Bill: The Roll Call of the House on the Crime Measure*, N.Y. Times, Aug. 22, 1994, at B6; K. Seelye, *Provision on Racial Bias in Death Sentence Appears Unlikely for Crime Bill*, N.Y. Times, July 14, 1994, at D3.

Court has repeatedly emphasized in cases involving juries, the very notion of "representativeness" requires that no significant group be excluded from the deliberative process. As Justice Marshall explained in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972):

> We are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded...the effect is to remove from the...room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury [or Congress] of a perspective on human events that may have unsuspected importance in any case that may be presented.[19/]

[19/] This Court's frequently cited discussion in *Ballard* v. *United States*, 329 U.S. 187, 193-94 (1946), with respect to juries and gender equally pertains to legislatures and race:

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

See also Taylor v. *Louisiana*, 419 U.S. 522, 531-32 (1975) (quoting *Ballard*).

Indeed, in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (emphasis added), Justice O'Connor recognized that in the context of jury deliberations, "[w]e know that *like race*, gender matters...[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them." Thus, African-American representatives perform an essential function in the deliberative processes connected with the proposal, assessment and enactment of legislation of all kinds.

Moreover, as the jury cases make clear, an African-American presence may also be essential to public perceptions of congressional legitimacy. *See J.E.B.*, 114 S. Ct. at 1429; *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991) (jury service "ensures continued acceptance of the laws by all of the people"). Again, a foreign policy issue illustrates the point. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[20] Increasing the number of African-American legislators in Congress is essential to the perceived legitimacy of the decisions that that body makes, particularly those which disproportionately affect the lives of African-American citizens.

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[20] As noted by the New York Times:

> Close to 30 percent of the Army's troops in Operation Desert Storm are black, though blacks are just 14 percent of the nation's population between 18 and 24. In a land war, black casualties will be similarly disproportionate. Is it fair? Is it inevitable? For answers, one must search the soul of American society.

The Killing Fields Aren't Level, N.Y. Times, Jan. 28, 1991, at A2.

Failure to ensure pluralism also limits the input of diverse outlooks in congressional debate, impairing Congress's insight into the problems facing the Nation. Such diverse input is crucial to combating the preconceived notions and unconscious prejudices of legislators. Pluralism thus permits the mutual education of individuals. Minorities learn of the concerns and fears of majorities, while majorities learn of the lives of others and experiences that they may well be unable to imagine. And, we believe, over time, more inclusive legislative bodies will enact laws that will increase integration within society.

Of particular salience to the case before the Court is the fact that the commonalities of African-American culture and political interests permeate the community of Georgia's African Americans. The political cohesiveness of Georgia's African-American population has been well documented. *See, e.g., Hall v. Holder,* 955 F.2d 1563, 1573 (11th Cir. 1992), *rev'd on other grounds,* 114 S. Ct. 2581 (1994); *City of Carrollton Branch of the NAACP v. Stallings,* 829 F.2d 1547, 1559 (11th Cir. 1987), *cert. denied,* 485 U.S. 936 (1988). It is, of course, no surprise since Georgia's African-American citizens are disproportionately undereducated, living in poverty, unemployed and ill-housed. Indeed, the court below had "no doubt that black citizens share concerns related to their conditions as black, e.g., the unusually high crime rate in black communities or combatting racism." (App. at 46)

Despite this clear community of interest, the court below refused to consider the "past and present reality" of the African-American experience, including the commonalities of that experience. *Thornburg* v. *Gingles*, 478 U.S. 30, 45 (1986). Rather, the trial court held that "while partially convincing, such a community of interest is barred from constitutional recognition." (App. at 45) However, in this view, *only* African Americans are barred from creating districts that empower their community. Apparently, in the lower court's view, other racial, ethnic, and religious groups are entitled to have their common interests recognized and to have congressional districts drawn to forward those interests while African Americans may not. This view turns

the Fourteenth Amendment completely on its head: the original intended beneficiaries of the Fourteenth Amendment—African-American slaves and their descendants—would be punished by that very Amendment. This is not the law and the Court must unequivocally reject the lower court's infirm logic.

C. Given Present-Day Political Realities, Genuine Integration Requires the Use of Minority-Majority Districts

As we have already pointed out, between the end of Reconstruction and the passage of the Voting Rights Act, Congress, like most other American institutions, was racially segregated. African Americans were almost entirely excluded. Moreover, as this Court recognized in *Shaw*, the formal enfranchisement of African Americans after 1965 did not actually remedy continued African-American exclusion from the halls of government. *See Shaw*, 113 S. Ct. at 2823; *see also Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994). Districting practices interacted with racial bloc voting to dilute the voting strength of African-American voters residing within majority-white districts.

As *Shaw* recognized, all districting is race-conscious "in that the legislature is always *aware* of race when it draws district lines...." 113 S. Ct. at 2826. Yet, because there are no dispositive districting criteria that require that one set of districts be chosen over all other possible plans, absent intentionally created minority-majority districts, it is statistically unlikely that even a few, if any, minority-majority districts would be created.[21/] And the brutal truth of contemporary American politics is that, absent minority-

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[21/] This point is not undermined by the statement in *Wright* v. *Rockefeller*, 376 U.S. 52, 56-58 (1964), relied on by this Court in *Shaw*, 113 S. Ct. at 2826, that it would have been difficult to draw congressional districts in Manhattan without "concentrations of nonwhite voters." While it might have been difficult to create four districts with equal proportions of nonwhite voters, it would have been entirely possible to create four districts all of which had a white majority.

majority districts, African-American representation would virtually disappear from Congress. There are 40 African-American members of the House of Representatives. Only two were elected from majority-white districts. Not a single African-American representative from the Deep South states covered by Section 5 of the Voting Rights Act was elected from a majority-white district.

This pervasive phenomenon describes state legislative elections as well. A recent exhaustive scholarly study of the impact of the Voting Rights Act showed that during the 1980's only *one percent* of majority-white southern state legislative districts elected African American representatives. By contrast roughly a quarter of African-American majority districts elected white representatives.[22/]

Georgia is no exception to this lamentable pattern of racial bloc voting.[23/] Indeed, Georgia provides a textbook example of

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[22/] *See* Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 335, 345 (C. Davidson & B. Grofman eds. 1994).

The absence of African-American representatives from majority-white districts cannot be ascribed to the placement of all African-American voters in minority-majority districts. A significant number of African-American voters live in majority-white districts, *see id.* at 338, but such districts nonetheless elected only white representatives almost without exception, *see id.*

[23/] The prevalence of racial bloc voting in Georgia is the latest manifestation of Georgia's post-Reconstruction effort to disfranchise African Americans. For extensive discussions of Georgia's voting history, *see generally* V.O. Key, Jr. *Southern Politics in State and Nation* (1950); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974).

(continued...)

the necessity of race-conscious minority-majority districting to achieve integration of the political process. Since passage of the Voting Rights Act, with only occasional exceptions, elections in Georgia in which voters have had a choice between black and white candidates have been polarized on the basis of race, undermining the possibility of black candidates being elected. One study has demonstrated that 86% of whites vote for the white opponent of an African-American candidate in all instances.[24]

White candidates who have faced African-American opponents often have exploited racially polarized voting by emphasizing the race of their opponent. Former Georgia State

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[23](...continued)
In 1877, Robert Toombs, the leader of the Georgia constitutional convention, declared, "Give us a convention, and I will fix it so that white people shall rule and the Negro shall never be heard from." Laughlin McDonald, Michael B. Binford & Ken Johnson, "Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, at 68 (C. Davidson & B. Grofman eds. 1994). The ensuing convention made good on Toombs's promise: it instituted a "cumulative poll tax" that required proof of payment of past as well as present poll taxes as a condition for voting, striking at the ability of blacks to vote until it was abolished in 1945. *Id.* The complete removal of African Americans from Georgia's politics came to fruition in 1908, with the Disfranchisement Act. For a detailed discussion of passage of the Act, *see* D. Grantham, Jr., *Hoke Smith and the Politics of the New South* 158-62 (1958). This scheme—with armed service, literacy and "good character" prerequisites for registration—was "specifically designed to prevent Negroes from voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-11 (1966).

These impediments stripped African Americans of the right to vote in Georgia through the middle of the 20th century. On the eve of adoption of the Voting Rights Act in 1965, fewer than one-third of voting-age blacks in Georgia were registered. The disparities were even greater in the state's 23 counties with black voting-age majorities, where an average of 89% of whites but only 16% of blacks were registered. *See* L. McDonald, *supra*, at 67.

[24] *See* L. McDonald, *supra* note 23, at 85.

Senator and Labor Commissioner, Albert J. Scott, testified in the trial below that white candidates facing African-American opponents have intentionally made race an issue.

> [I]n many cases, you will find that [a white candidate] will take out a paid ad. And if you don't want to run one yourself, he'll run it for you, and put an ad in the paper with your picture and everything else to make certain that... people with leanings that perhaps wouldn't be in your favor [ ] recognize the fact that without a doubt you are black. That takes place all the time.[25]

Further, as courts have regularly recognized, continuing voting registration disparities between African Americans and whites, which also minimize the effectiveness of African-American voting, are the product of the lingering effects of historic discrimination in voting. *See, e.g., Gingles* v. *Edmisten*, 590 F. Supp. 345, 359-60 (E.D.N.C. 1984), *aff'd in part sub nom., Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

African-American political participation in Georgia also has been minimized through districting practices. In 1971, the legislature enacted a congressional districting scheme that divided the cohesive black population of Atlanta into two districts. Only after a legal challenge the following year did the legislature amend the scheme to create a district composed 44% of African Americans. Although Andrew Young was elected to Congress from

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[25] Trial Transcript, Vol. VI at 79, July 27, 1994; Generally, black candidates in Georgia have succeeded (other than in minority-majority districts) only by minimizing their racial identity. For example, Robert Benham, the first black to win statewide office in Georgia, was elected to the Court of Appeals in 1984 and the State's Supreme Court in 1990, with a strategy of obscuring the fact that he is African American. In white communities, Benham did not circulate campaign literature with his picture. Nor did Julian Bond, Jesse Jackson or anyone in the civil rights community campaign for or publicly endorse him. *See* L. McDonald, *supra* note 23, at 85.

this district in the ensuing election (becoming the first African-American representative to serve from Georgia in more than a century), no other African American has succeeded in a congressional election in a district where the majority of the voting-age population was not African American. *See Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

After the 1981 census, the Georgia legislature again attempted to limit the effectiveness of African-American voters, creating only one (of ten) minority-majority district. This plan, invalidated by a district court, was the product of intentional discrimination. Among other things, in the process of adopting the discriminatory plan, Joe Mack Wilson, chairman of the House Reapportionment Committee, stated to his colleagues: "I don't want to draw nigger districts." *Id.* at 501.

The bottom line is this: from our own experience, the members of the Caucus have seen the tangible and intangible differences the presence of substantial numbers of African Americans make in the work of Congress. We also know, as practical politicians aware of the voting behavior of citizens inside and outside our districts, that minority-majority districts in Georgia and elsewhere are the only way of providing African-American voters with an opportunity to elect the representatives of their choice. Thus, if the American political system is to achieve real integration at all levels of the political process while continuing to use single-member districts to elect congressional representatives, race-conscious minority-majority districts are essential.

III.

MINORITY-MAJORITY DISTRICTS LIKE GEORGIA'S DISTRICT ELEVEN NEITHER SEGREGATE VOTERS NOR IMPAIR FULL REPRESENTATION OF ALL CONSTITUENTS' INTERESTS

Shaw identified several potential dangers that the deliberate creation of "bizarre," "highly irregular" or "tortured" minority-

majority districts might cause. *See Shaw*, 113 S. Ct. at 2825–27. For the reasons set out at length in the State's brief and in the dissenting opinion below (App. at 92–101), the Caucus believes that Georgia's District Eleven does not fall within this suspect category; that district adheres to many traditional districting criteria and is no more irregular or bizarre than a multitude of other congressional districts. Nevertheless, an assessment of the fears noted by the *Shaw* Court—an assessment all but abandoned by the court below—reveals that Georgia's District Eleven does not foster any detrimental result.

Shaw's use of the word "segregate" makes clear the Court's concern that race-conscious districting may somehow separate voters by race and limit voters' decisions about whom to support and how to conduct their everyday affairs, as well as affect public officials' behavior after an election is over. The Caucus submits that, under current conditions, neither Georgia's District Eleven nor the other minority-majority districts challenged in the wake of *Shaw* in fact give rise to the potential harms hypothesized by the Court.

A. Contrary to the Suggestion of Segregation, the Challenged Congressional Districts Are Among the Most Racially Integrated Districts in the Nation

Large numbers of whites and African Americans live in racially segregated neighborhoods. This neighborhood-level segregation is the product of many factors, including past and present racial discrimination, as well as varying economic opportunity. Not surprisingly, then, many congressional districts are racially segregated. Their populations are either overwhelmingly white, African American or Hispanic.[20] Ironically, neither this

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[20] For example, 28 congressional districts in the South are more than 90% non-Hispanic white. *See* David Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order* 26 (The Joint Center for Political and Economic Studies 1994).

nor any other pending voting rights case has challenged the legality of these districts based on their segregated characteristics.

Rather, districts such as Georgia's District Eleven are under siege. District Eleven, and the other challenged minority-majority districts, however, are among the *least* segregated districts in the Nation. Unlike the vast majority of congressional districts, these districts are racially diverse rather than homogeneous. Indeed, only slightly more than half of that district's voters—60%—are African American, while 40% are white.

Other challenged districts are no less integrated. North Carolina's Districts One and Twelve, both maligned as segregated, are similarly integrated, each with voting age populations of approximately 53% African American, 46% white and 1% Hispanic. Texas' District Eighteen is a coalition of voters: 49% African American, 37% white and 14% Hispanic, and District Thirty is similarly integrated. The distribution of the voting-age residents of Louisiana's Fourth District is 55% African American and 45% white. When these districts are compared to some of their white-majority counterparts, such as North Carolina's Fifth, which is 85% white, or Texas's Eleventh, which is 89% white, or Georgia's Ninth, *which is 94.9% white*, the integrated nature of these districts and of District Eleven is clear.[27/]

Georgia's District Eleven is not segregated. Any other conclusion implicitly endorses a view that: *districts that have even the slightest majority of African Americans are segregated, while white-majority districts are integrated*. This Court must unequivocally reject this pernicious view.

Further, there is no danger that challenged minority-majority districts will cause racial segregation. As an empirical matter, citizens simply do not choose where to live based on congressional district lines. *See Shaw* v. *Hunt*, 861 F. Supp. 408

[27/] *See* Higginbotham *et al.*, *supra* note 1, at 1653-57 Apps. E & F (for racial composition of southern congressional districts).

(E.D.N.C. 1994). Thus, the Voting Rights Act and reapportionment more generally will not affect residential patterns. Minority-majority districts, in other words, do not exacerbate existing segregated residential patterns. Rather, these districts bring together African-American and white voters and do nothing more than recognize that, at the neighborhood level, Georgia, like many other states, is *already* separated and segregated, and Georgia voting patterns are already divided along racial lines.

B. The Representatives Elected From the Challenged Districts Faithfully Represent the Interests of All Their Constituents

The other danger this Court identified in *Shaw* was that representatives elected from "bizarre" minority-majority districts might ignore the needs of constituents who are not members of the racial majority within their districts. Given legislators' inevitable awareness of the racial composition of their districts, *see Shaw*, 113 S. Ct. at 2826, however, this danger obviously exists regardless of the shape of the district that elected them, the racial component of the majority, and the race of the elected representative. Surely this Court does not suppose that African-American representatives from minority-majority districts are inherently less likely than their white counterparts to represent all their constituents fairly.[2/]

In fact, members of the Caucus represent *all* the residents of their districts, whatever their race. Our doors are always open

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[2/] The implication that white representatives elected from white-majority districts can adequately and fairly represent the interests of their minority constituents, but that African Americans or other minorities cannot represent the interests of white constituents, is indefensible. In fact, this nation's experience has been to the contrary: for centuries many white legislators at all levels of government acted against the interests of their African-American constituents.

to all constituents.[29] We perform the traditional constituent service functions with the same vigor for white constituents as we do for African-American constituents. We also zealously represent the geographically defined interests of our districts—for instance, the needs of particular employers or industries.

Moreover, it would be illogical to conclude that the representatives elected from the Georgia's District Eleven or other minority-majority districts pursue only a "racial agenda." Congressional representatives have voting responsibility on a wide range of issues. While some of those issues, such as health care, crime control and welfare reform, are issues about which African Americans have strong concerns, solutions to these issues are not approached on the basis of race. Indeed, by all assessments, the African-American representatives of the 103rd Congress acted ably and fairly to represent the interests of all of their constituents. [30]

C. Minority-Majority Districts Do Not Increase Racial Polarization

Nothing in the record in this case or in any of the other cases that have followed *Shaw* has provided even the slightest empirical support for the proposition that race-conscious districting has increased the levels of racial-bloc voting within minority-majority districts. Indeed, our experience suggests the contrary with regard to the attitudes of white voters. Familiarity with black elected officials breeds content, not contempt: white voters are far *more* likely to vote for African-American incumbents than they are for African Americans seeking open seats.

The reasons, as the previous section of this brief suggests, are not hard to fathom. Our constituent service, our championship

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[29] Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 214 (E.D. Ark. 1989) (white state legislators in Arkansas sent black constituents from their own districts to seek assistance from African-American representatives elected from other districts), *aff'd*, 498 U.S. 1019 (1991) .

[30] *See* Bositis, *supra* note 26, at 29-30.

of the diverse interests of our districts' citizens, and our fidelity to the public interest show our white constituents that African-American elected officials will represent them fairly and diligently. Thus, virtually *all* of us have received increased support from the white community over time. If anything, then, our districts have decreased the levels of racial polarization or balkanization in American society.

CONCLUSION

This case raises fundamental issues concerning our representative democracy. To forge their view of American democracy, appellees conjure a utopia—a color-blind society—where an individual's race has little impact on his or her life, where the race of a candidate for political office does not influence citizens' voting behavior and where African Americans do not have shared political interests simply because of the color of their skin. This is our dream too. As the poet Langston Hughes eloquently wrote:

> I dream a world where all
> Will know sweet freedom's way
> Where greed no longer saps the soul
> Nor avarice blights our day
> A world I dream where black or white,
> Whatever race you be,
> Will share the bounties of the earth
> And every man is free.[31/]

The court below adhered to a similar vision, noting that "[b]lacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths." (*See* App. at 82) But the journey of African Americans on the path to equality is still in its nascent stage. The dream of equality cannot substitute for reality in interpreting the Constitution today, at a time when the United States has not yet attained this hopeful vision. The realities

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[31/] L. Hughes, "I Dream a World," in *American Negro Poetry* 71-72 (A. Bontemps ed., 1963).

are that race matters;[32] that voting is racially polarized; that the color of a candidate's skin does affect voting; that many African Americans do have shared political interests. In light of these realities, the necessity of minority-majority districting to render our democracy representative is compelling.

The *Johnson* Court abdicated its responsibility to ground its legal analysis in the racial realities of the Nation today. This Court should reject the conclusions of the court below, which are in conflict with the realities of racial bloc voting and African-American exclusion from the political process, as well as the rules laid down in *Shaw*.

Reality: from 1871 to 1973, no African American from Georgia served in the United States Congress. Georgia's post-1990 reapportionment represents the state's good-faith effort to remedy that tragic history of racial exclusion. Reality: for the first time in the state's history, Georgia has a truly integrated congressional delegation that fairly reflects the state's racial diversity. Reality: three African Americans now serve; each represents a racially integrated district.

This Court should not sanction efforts to turn the clock back towards the days of a lily-white legislature governing a diverse nation. This Court should emphatically reject the theory that a 60% African-American constituency—like the challenged Georgia Eleventh District—is segregated while a 95% white district—like another in Georgia—is not. Thus, this Court should reverse the judgment of the district court and hold that states have

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[32] *See* Cornel West, *Race Matters* 3 (1993):

> To engage in a serious discussion of race in America, we must begin not with the problems of black people but with the flaws of American society—flaws rooted in historic inequalities and longstanding cultural stereotypes. How we set up the terms for discussing racial issues shapes our perception and response to these issues.

the power to ensure the equal opportunity of African-American citizens to participate in all levels of a pluralist political process.

Dated: February 21, 1995

Respectfully submitted,

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APPENDIX A

ister any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer

or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

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